

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBIN J.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 2:19-cv-01799

ORDER AFFIRMING
DEFENDANT'S DECISION TO
DENY BENEFITS

Plaintiff has brought this matter for judicial review of Defendant's denial of her application for supplemental security income ("SSI") benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13. For the reasons set forth below, the Court affirms Defendant's decision to deny benefits.

I. ISSUES FOR REVIEW

1. Did the ALJ err in evaluating the medical opinion evidence?
2. Did the ALJ properly develop the record?

II. BACKGROUND

Plaintiff filed three disability claims in 2005, 2010, and 2013, all of which were denied either at the hearing level or by the Social Security Appeals Council. AR 221.

1 On December 11, 2014, Plaintiff filed a new claim for SSI, alleging a disability
2 onset date of September 8, 2014. AR 192. Plaintiff amended her disability onset date to
3 December 11, 2014. AR 109. Plaintiff's application was denied initially and upon
4 reconsideration. AR 192. A hearing was held before Administrative Law Judge ("ALJ")
5 Larry Kennedy on November 12, 2015. AR 99-149. On June 22, 2016, ALJ Kennedy
6 issued a decision finding that Plaintiff was not disabled. AR 189-211. On September 8,
7 2016, the Appeals Council denied Plaintiff's request for review. AR 221. On April 17,
8 2017, this Court issued an order affirming ALJ Kennedy's decision. AR 248-65.

9 On December 13, 2016, Plaintiff filed a new application for SSI, this time alleging
10 a disability onset date of January 10, 2006. AR 85, 349-57. Plaintiff amended her
11 disability onset date to December 13, 2016. AR 153-54. Plaintiff's application was
12 denied initially and on reconsideration. AR 85, 268-76, 281-87. A hearing was held
13 before ALJ Stephanie Martz on August 23, 2018. AR 150-88. On October 10, 2018, ALJ
14 Martz issued a decision finding that Plaintiff was not disabled. AR 82-93. On September
15 9, 2019, the Appeals Council denied Plaintiff's request for review. AR 1-7.

16 Plaintiff seeks judicial review of ALJ Martz's October 10, 2018 decision. Dkt. 2.

17 III. STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
19 denial of social security benefits if the ALJ's findings are based on legal error or not
20 supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874
21 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is "such relevant evidence as a
22 reasonable mind might accept as adequate to support a conclusion." *Biestek v.*
23 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

IV. DISCUSSION

In this case, the ALJ found there was no change in Plaintiff's condition between June 22, 2016, the date of the prior ALJ's decision, and December 2017, when Plaintiff exhibited worsening pain in her back, thigh, and foot, and an MRI of Plaintiff's lumbar spine revealed a bulging, extruded disc with nerve root impingement. AR 85-86.

The ALJ found that Plaintiff had the severe impairments of degenerative disc disease of the lumbar and cervical spine, degenerative joint disease of the right knee, asthma, and beginning in December 2017, lumbar radiculopathy. AR 88. The ALJ also found that Plaintiff had the non-severe impairment of alcohol use, in remission. *Id.*

Based on the limitations stemming from Plaintiff's severe and non-severe impairments, the ALJ found that between Plaintiff's amended onset date of December 13, 2016 and November 30, 2017, Plaintiff could perform medium work with a range of postural and environmental limitations. AR 89. The ALJ found that beginning in December 2017, Plaintiff could perform light work, with identical postural and environmental limitations. *Id.*

Relying on vocational expert ("VE") testimony, the ALJ found that Plaintiff could perform her past work; therefore the ALJ determined at step four of the sequential evaluation that Plaintiff was not disabled. AR 92-93.

A. Whether the ALJ erred in evaluating the medical opinion evidence

Plaintiff contends that the ALJ erred in discounting an opinion from Plaintiff's treating physician, Ellen Kim, M.D. Dkt. 12, pp. 2-9.

In assessing an acceptable medical source – such as a medical doctor – the ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.

1 1995) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)); *Embrey v. Bowen*,
2 849 F.2d 418, 422 (9th Cir. 1988)). When a treating or examining physician's opinion is
3 contradicted, the opinion can be rejected "for specific and legitimate reasons that are
4 supported by substantial evidence in the record." *Lester*, 81 F.3d at 830-31 (citing
5 *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d
6 499, 502 (9th Cir. 1983))

7 Dr. Kim provided an opinion concerning Plaintiff's physical limitations on October
8 20, 2016. AR 458-59. Dr. Kim diagnosed Plaintiff with lumbar disc disease, fibromyalgia,
9 and arthritis of the knees, and opined that the symptoms associated with these
10 impairments would "constantly" interfere with Plaintiff's ability to maintain attention and
11 concentrate at work, resulting in unscheduled breaks every 20 minutes. AR 458. Dr.
12 Kim further opined that Plaintiff could sit for one hour in an eight-hour day, and stand
13 and/or walk for less than 30 minutes. *Id.* Dr. Kim added that Plaintiff could occasionally
14 lift and carry up to 10 pounds, would have a range of manipulative limitations, and
15 would likely be absent from work more than four times per month due to her
16 impairments. AR 458-59.

17 The ALJ assigned "little weight" to Dr. Kim's opinion, reasoning that: (1) the
18 severe degree of limitation reflected in Dr. Kim's opinion is inconsistent with Plaintiff's
19 statements about her activities to an investigator from the Cooperative Disability
20 Investigations Unit ("CDIU") in February 2016; and (2) another examining source,
21 Kirsten Nestler, M.D., suspected that Plaintiff was exaggerating her mental health
22 symptoms. AR 92.

1 With respect to the ALJ's first reason, a conflict between a treating physician's
2 opinion and a claimant's activity level can serve as a specific and legitimate reason for
3 rejecting the opinion. *Ford v. Saul*, 950 F.3d 1141, 1155 (9th Cir. 2020).

4 Here, the ALJ found that Dr. Kim's opinion concerning Plaintiff's lifting, standing,
5 walking, and sitting limitations was inconsistent with Plaintiff's statements and
6 presentation to a CDIU investigator, where she stated that she performs "all the house
7 cleaning, cooking, laundry, and shopping for her family", has no difficulty riding the bus
8 "all the time", and was "babysitting weekly and has been for approximately fifteen
9 months." AR 92, 696-98. The ALJ's reasoning is supported by the CDIU investigator's
10 observations, which also indicate that Plaintiff had no difficulties with ambulation or
11 carrying large shopping bags, and was looking for work in Alaska. AR 695, 697.

12 Plaintiff contends that the ALJ erred by relying on the CDIU report, which was
13 completed by two investigators who do not have medical training. Dkt. 12, p. 6, n. 2. An
14 ALJ may rely upon the findings of CDIU investigators in assessing a claimant's
15 testimony, and the ALJ did not err in relying on this evidence in discounting Dr. Kim's
16 opinion. See *Richards v. Berryhill*, 713 Fed. Appx. 545, 548 (9th Cir. 2017) ("The ALJ
17 did not err by giving great weight to the evidence and testimony submitted by the
18 Cooperative Disability Investigation Unit."); *Elmore v. Colvin*, 617 Fed. Appx. 755, 757
19 (9th Cir. 2015) (Rejecting argument that the ALJ improperly relied upon a CDIU
20 investigation, noting "the Social Security Act expressly authorized the Commissioner to
21 conduct such investigations.")

22 While the ALJ has provided an additional reason for discounting Dr. Kim's
23 opinion, the Court need not assess whether these reasons were proper, as any error
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1 would be harmless. See *Presley-Carrillo v. Berryhill*, 692 Fed. Appx. 941, 944-45 (9th
2 Cir. 2017) (citing *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th
3 Cir. 2008)) (although an ALJ erred on one reason he gave to discount a medical
4 opinion, “this error was harmless because the ALJ gave a reason supported by the
5 record” to discount the opinion).

6 Accordingly, the ALJ has provided a specific and legitimate reason for
7 discounting Dr. Kim’s opinion.

8 B. Whether the ALJ should have further developed the record

9 Plaintiff contends that the ALJ erred by not ordering a consultative examination to
10 re-assess Plaintiff’s impairments given that the ALJ found that Plaintiff’s back
11 impairment worsened in December 2017. Dkt. 12, pp. 9-11.

12 The ALJ has an independent duty to fully and fairly develop the record.
13 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (quoting *Smolen v. Chater*,
14 80 F.3d 1273, 1288 (9th Cir. 1996) (quoting *Brown v. Heckler*, 713 F.2d 411, 443 (9th
15 Cir. 1983) (per curiam))). The duty to develop the record is triggered “when there is
16 ambiguous evidence or when the record is inadequate to allow for proper evaluation of
17 the evidence.” *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (citing
18 *Tonapetyan*, 242 F.3d at 1150).

19 Plaintiff contends that the erred by not ordering an additional consultative
20 examination because the most recent opinion the ALJ relied upon, a July 2017 opinion
21 from non-examining state agency consultant Howard Platter, M.D. which assessed
22 Plaintiff as being able to perform medium work with a range of postural and
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1 environmental limitations, is stale, and does not accurately capture Plaintiff's worsening
2 condition as of December 2017. Dkt. 12, pp. 9-11.

3 The ALJ gave "great weight" to Dr. Platter's opinion, but acknowledged that Dr.
4 Platter did not have access to the most recent MRI and documentation of improvement
5 after Plaintiff's 2018 microdiscectomy. AR 92.

6 Social Security regulations and Ninth Circuit case law establish that an ALJ has
7 broad latitude in determining when to order a consultative examination. See 20 C.F.R. §
8 404.1519a(b); *Reed v. Massanari*, 270 F.3d 838, 842 (9th Cir. 2001) ("An ALJ has
9 broad discretion in determining whether to order a consultative examination and may do
10 so when 'ambiguity or insufficiency in the evidence ... must be resolved'").

11 Here, the ALJ's conclusion that Plaintiff's condition worsened after December
12 2017, rendering her capable of performing light rather than medium work, is supported
13 by substantial evidence, and the Court cannot say that the ALJ erred by not ordering an
14 additional consultative examination.

15 C. Additional evidence

16 The record contains evidence submitted by Plaintiff after the ALJ issued his
17 decision. AR 8-76. The Appeals Council denied review of Plaintiff's claim and opted not
18 to exhibit this evidence, reasoning that it did not relate to the period at issue. AR 2.

19 This Court must consider this additional material in determining whether the
20 ALJ's decision is supported by substantial evidence. See *Brewes v. Commissioner of*
21 *Social Security*, 682 F.3d 1157, 1160 (9th Cir. 2012) (when a claimant submits evidence
22 for the first time to the Appeals Council, which considers that evidence in denying
23 review of the ALJ's decision, the new evidence is part of the administrative which the
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1 district court must consider in determining whether the Commissioner's decision is
2 supported by substantial evidence).

3 Here, the evidence in question consists of treatment notes from 2019 detailing
4 Plaintiff's back and left leg impairments. AR 8-76. If Plaintiff's condition worsened after
5 the ALJ's October 2018 decision, the proper course is for Plaintiff to file a new
6 application and present new evidence so the agency can ascertain whether Plaintiff's
7 conditions were disabling after the ALJ issued his decision.

8 CONCLUSION

9 Based on the foregoing discussion, the Court finds the ALJ properly determined
10 plaintiff to be not disabled. Defendant's decision to deny benefits therefore is

11 AFFIRMED.

12 Dated this 21st day of December, 2020.

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14 Theresa L. Fricke
15 United States Magistrate Judge
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